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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

Nos. 474 and 475

ANGELO HERNDON,

Appellant,

vs.

J. I. LOWRY, SHERIFF OF FULTON COUNTY.

APPEALS FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

STATEMENT AS TO JURISDICTION.

WHITNEY NORTH SEYMOUR,
Counsel for Appellant.

HERBERT T. WECHSLER,
W. A. SUTHERLAND,
WALTER GELLHORN,
Of Counsel.

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STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of this Court appellant submits herewith his statement showing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgments in the above-entitled causes.

Opinions Below.

Neither the opinion of the Supreme Court of Georgia nor that of the court of original jurisdiction has been officially reported. The former appears at page 35 and the latter at page 20 of the Record and both are appended to this statement. The earlier opinion of the Supreme Court of Georgia on appeal from the judgment of conviction is

reported in 178 Ga. 832, and its opinion upon the denial of a petition for rehearing is reported in 179 Ga. 597. The opinion of this Court dismissing for want of jurisdiction the appeal from the judgment affirming the judgment of conviction is reported in 295 U. S. 441. The dissenting opinion of Mr. Justice Cardozo (concurred in by Mr. Justice Brandeis and Mr. Justice Stone) appears in 295 U. S. 446. This Court's denial of a petition for rehearing is recorded in 296 U. S. 661.

Jurisdiction.

This Court has jurisdiction under § 237 (a) of the Judicial Code as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928, to review the judgment of the court below upon appeal.

(1)

THE APPEAL IS TIMELY.

The judgment of the Supreme Court of Georgia was entered June 13, 1936. The petition for the allowance of an appeal was presented to Hon. Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia, on September 10, 1936, and was allowed by him on September 10, 1936.

(2)

THE VALIDITY OF A STATE STATUTE UNDER THE FEDERAL CONSTITUTION WAS DRAWN INTO QUESTION AND THE DECISION WAS IN FAVOR OF ITS VALIDITY.

(a)

The Statute.

The statute, the validity of which as construed and applied to appellant was drawn into question by proceedings

on habeas corpus, is Section 56 of the Penal Code of Georgia (Acts 1866, p. 152), which provides:

> Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection.[1]

The statute was construed by the Supreme Court of Georgia in its opinion upon the petition for rehearing of

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[1]The punishment for an attempt to incite insurrection is provided by Section 57 of the Penal Code (Acts 1866, pp. 152, 153, as amended by Acts 1871, pp. 19, 20) as follows:

> Any person convicted of the offense of insurrection, or an attempt to incite insurrection, shall be punished with death; or, if the jury recommend to mercy, confinement in the penitentiary for not less than five nor more than twenty years.

Insurrection is defined in Section 55 of the Penal Code (Acts 1866, pp. 152, 153) as follows:

> Insurrection shall consist in any combined resistance to the lawful authority of the State, with intent to the denial thereof, when the same is manifested or intended to be manifested by acts of violence.

[2]In its original opinion affirming the judgment of conviction the statute was construed somewhat differently, as follows: "• • • Force must have been contemplated but, as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. • • • Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time, as a result of his influence, by those whom he sought to incite. • • •" (178 Ga. 855). The construction of the statute by the trial court differed radically from both constructions on appeal. The jury was charged

the judgment affirming appellant's conviction[2] in the following manner:

> "Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it have been necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would (be) sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." (179 Ga. 600.)

In holding that appellant had violated the statute and affirming his conviction thereunder (178 Ga. 832, 179 Ga. 597) the Supreme Court of Georgia construed the statute to apply to the situation presented by the facts of this case.

The validity of the statute as thus construed and as applied to the facts of appellant's case under the Fourteenth Amendment was drawn in question in the present habeas corpus proceeding and the decision was in favor of its validity.

(b)

Nature of the Case.

Appellant, a young Negro, petitioned for *habeas corpus* in the Superior Court of Fulton County, Georgia, his peti-

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[2] "• • • that advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or was advocated" (R. 13, Exhibit C to petition for *habeas corpus*).

tion alleging that he was unlawfully detained and held in custody by the appellee, J. I. Lowry, as sheriff of the county, the sole claim of authority under which he was held being a judgment of the Superior Court of Fulton County reciting his conviction of "attempting to incite insurrection" in violation of section 56 of the Georgia Penal Code and sentencing him to confinement in the Fulton County jail until his removal therefrom for imprisonment at hard labor in the Georgia penitentiary or some other place designated by the Governor for not less than eighteen nor more than twenty years (R. 7). Attached to the petition as Exhibit C and incorporated therein was a portion of the record on the appellant's appeal from the judgment of conviction to the Supreme Court of the United States, containing a full statement of the evidence upon which the judgment and other proceedings at the trial were based. The petition alleged that there "is nothing in the evidence upon which petitioner's conviction is based to show that there was a clear and present danger that violence or other unlawful acts would result from petitioner's actions, or that petitioner advocated violence or other unlawful acts, or that violence or other unlawful acts would probably result from any of petitioner's actions, or that whatever violence or other unlawful acts might result from any of petitioner's actions would be likely to occur in the immediate or forseeable future or at any given time" (R. 2). The indictment upon which the petitioner was tried, the judgment of conviction and the sentence of imprisonment were all alleged to be void and the detention to be illegal and unconstitutional because of the unconstitutionality of Section 56 of the Georgia Penal Code. The petitioner contended that the Statute is invalid on its face and as construed and applied to the facts of his case by the Supreme Court of Georgia, by reason of the fact that as written and "as thus con-

strued and applied it is in conflict with the Fourteenth Amendment to the Constitution of the United States in the following particulars: (a) It denies and unduly restricts petitioner's freedom of speech and of assembly" and "(b) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt" (R. 3). The invalidity of the statute as construed and applied was also claimed under various provisions of the State constitution which are not now material. Finally, the petitioner alleged that although the judgment under color of which he was held in custody had been affirmed by the Supreme Court of Georgia, a petition for rehearing denied by that court, an appeal to this Court dismissed for want of jurisdiction and a petition for rehearing denied by this Court, there has been no adjudication in his case by any court of the validity under the constitutions of the United States and of the State of Georgia, of the statute under which he was convicted.

The writ issued. The appellee answered, demurred specially to the portion of the petition incorporating the evidence contained in the record on appeal, and, in addition, moved to strike the allegation with respect to such incorporation, as well as the exhibit itself (R. 15). At the final hearing upon the petition and answer the portion of the record above referred to was identified, conceded by appellee to be a correct statement of the evidence presented at the trial, and was received in evidence over his objection (R. 23, appellee's bill of exceptions to Supreme Court of Georgia). The only evidence offered by appellee was appellant's motion, before trial, to quash the indictment, which was received. The Court denied appellee's motion to strike, overruled his special demurrer and objection to the admission of the trial record and held (1) "That the applicant's contention that this law in question as construed and applied in his case is in conflict with the Fourteenth Amend-

ment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with article 1, section 1, paragraph 3, of the Constitution of the State of Georgia, for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be and the same is hereby sustained;" (2) "Contentions of applicant other than that above stated are not sustained" (R. 20). Appellant was ordered released unless an appeal were filed, and in that event, his release was ordered on bail (R. 21).

Appellee appealed to the Supreme Court of Georgia, assigning as error the rulings on his demurrer, motion and objection and the decision that the statute is invalid. As required by the Georgia practice to bring up for review the other grounds of invalidity urged in the petition and overruled by the Superior Court, appellant filed a cross-appeal, assigning as error the decision adverse to those contentions. The two appeals were docketed as separate cases. In a single opinion, the Supreme Court of Georgia reversed on appellee's appeal and affirmed on appellant's appeal. The opinion stated (a) "Neither as expressed, nor as it was construed by this Court," is the statute void "as violative of the Fourteenth Amendment of the Federal Constitution" for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly;" (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt;" (b) "Neither is the statute so construed and applied void as violative" of various provisions of the State constitution invoked by appellant; (c) The decision of the superior court that the statute is unconstitutional under the fourteenth amendment and the provisions of the State constitution on the ground that it is "too vague and indefinite to provide a sufficiently ascer-

tainable standard of guilt" was erroneous; (d) There was no error "in refusing to hold the statute void as violative of the several provisions of the State and Federal constitutions for the several other grounds of attack urged against them • • • to which the cross bill of exceptions relates;" (e) "Under the pleadings and evidence, which embraced the record on the trial that resulted in the conviction, the Court erred in the *habeas corpus* proceeding in refusing to remand the prisoner to the custody of the officers." (See Appendix B.)

(c)

Federal Questions Were Properly Raised and were Decided Adversely to Appellant.

(1) Appellant's petition for *habeas corpus* properly presented his contention that the statute under which he was convicted as written and as construed and applied by the Supreme Court of Georgia in affirming his conviction conflicts with the Fourteenth Amendment to the Constitution of the United States in the following respects:

(1) It denies and unduly restricts freedom of speech and of assembly;

(2) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

The remedy of *habeas corpus* was available under the Georgia practice after trial and conviction where the constitutional questions were not passed upon in the criminal case.

Griffin v. *Eaves*, 114 Ga. 65.

Accordingly, the questions would be presented to this Court even had they not been decided below. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282.

(2) It is, however, unnecessary for this Court to inquire into the propriety of the procedure under the State practice because all questions on these appeals were decided by the Superior Court of Fulton County and, upon appeal, by the Supreme Court of Georgia. The Superior Court considered the case on the merits and decided that appellant's contention that the statute as construed and applied was invalid under the fourteenth amendment because it denied and unduly restricted freedom of speech and assembly was without merit and that his contention that the statute was invalid as construed and applied because it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt was well founded. The Supreme Court held that the superior court correctly decided against the first contention and incorrectly decided in favor of the second. The validity of the statute was therefore sustained on both points on the merits and the judgment reversed on appellee's bill of exceptions and affirmed on appellant's cross-bill of exceptions.

Accordingly, both questions are properly before this Court.[3] *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 60, 70-71; *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Cumberland Coal Co.* v. *Board*, 284 U. S. 23, 24; *Home Insurance Co.* v. *Dick*, 281 U. S. 397, 407; *Grayson* v. *Harris*, 267 U. S. 352, 358; *Illinois Central R. R. Co.* v. *Kentucky*, 218 U. S. 551, 556; *St. Louis, Iron Mountain and S. Ry.* v. *Hesterly*, 228 U. S. 702, 704; *Rogers* v. *Hennepin County*, 240 U. S. 184, 188; *Louisville & Nashville Ry.* v. *Higdon*, 234 U. S. 592, 597-8; *Collins* v. *Texas*, 223 U. S. 288,

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[3] *Doyle* v. *Atwell*, 261 U. S. 590 is not in point because in that case the State Court had held that the remedy of *habeas corpus* was not available and this Court regarded that as an adequate non-Federal ground upon which the decision of the State court was rested.

297; *Asher* v. *Texas*, 128 U. S. 129; *Blodgett* v. *Silberman*, 277 U. S. 1, 7; and see *Mooney* v. *Holohan*, 294 U. S. 103, 115.

(3)

THE APPEAL IS FROM A FINAL JUDGMENT OF THE HIGHEST COURT OF THE STATE OF GEORGIA.

The judgment directs that the prisoner be remanded to custody; it affirms the legality of his detention; it is final both in form and substance. The Supreme Court of Georgia is the highest court of the State.

(4)

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL.

(1) Whether a State statute may, without violating the Fourteenth Amendment, make criminal any attempt by persuasion or otherwise to induce others to combine together for the purpose of achieving fundamental changes in the economic, political or social structure of the country, provided only that the person making the attempt intends that forcible resistance to the authority of the State shall occur "at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" is a substantial Federal question.

The statute, as construed by the highest court of the State, makes criminal any effort to induce others to combine in forcible resistance to the authority of the State, however remote the time when the suggested force is to be used, if the contemplated length of time is such that one might reasonably expect his conduct to have some persuasive power at the time of the occurrence. It is immaterial whether force is actually employed in the particular

case, whether there was intent or inducement that it should be employed immediately or in the near future or whether there was any genuine probability that it would be employed at all. This construction must be regarded as written into the statute by the authoritative hand of the State. (*Morehead* v. *New York ex rel. Tipaldo*, No. 838, October Term, 1935, 80 L. Ed. 921, 926; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 220). Such a statute is invalid under the criterion enunciated by this Court in *Schenck* v. *United States*, 249 U. S. 47 (1919), that to justify an abridgment of the freedom of speech guaranteed by the first amendment the words spoken or otherwise disseminated must be used "in such circumstances" and be "of such a nature as to present a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent" (249 U. S. 47, 52). See also *Debs* v. *United States*, 249 U. S. 211. That freedom of speech and of assembly are comprehended within the "liberty" guaranteed by the due process clause of the Fourteenth Amendment is settled. (*Gitlow* v. *New York*, 268 U. S. 652, 666; *Whitney* v. *California*, 274 U. S. 357, 362, 371, 373; *Fiske* v. *Kansas*, 274 U. S. 380, 382; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Stromberg* v. *California*, 283 U. S. 359, 368; *Hamilton* v. *Regents of University of California*, 293 U. S. 245; *Grosjean* v. *American Press Company*, 297 U. S. 233.) Appellant's contention that the "clear and present danger" test of the *Schenck* case marks the boundary of permissible abridgment of that freedom by State statute "has color of support in words uttered from this bench and uttered with intense conviction" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 446). There is no authoritative determination in cases arising under either the Fifth or the Fourteenth Amendment that this criterion has been altered or abandoned (cf.

Abrams v. *United States*, 250 U. S. 616; *Pierce* v. *United States*, 252 U. S. 239; *Schaefer* v. *United States*, 251 U. S. 466). In two cases a minority of this Court has affirmed its applicability to the guaranty of the Fourteenth Amendment while the majority of the Court has sustained the validity of the State statute on the ground that the passage of the act making criminal the advocacy of a particular revolutionary doctrine, explicitly set forth, or the formation of an association for the purpose of such advocacy, evidenced a legislative finding, not unreasonable in character, that advocacy of the proscribed doctrine involved great danger of causing the kind of conduct which the State may endeavor to prevent (*Gitlow* v. *New York*, *supra*, *Whitney* v. *California*, *supra*). But section 56 of the Georgia Penal Code is plainly not of the same character as the statutes sustained in the *Gitlow* and *Whitney* cases, as to which a reasonable legislative finding of danger was held an adequate substitute for the judicial finding envisaged by the *Schenck* case. No specific doctrine is explicitly stated and condemned by the statute; what is punished is any attempt—by persuasion or otherwise—to achieve a specific result—the inducement of others to combine at some indefinite future time in forcible resistance to the authority of the State. The present statute is not one "condemning utterances identified by a description of their meaning" (Mr. Justice Cardozo, dissenting, *Herndon* v. *Georgia*, 295 U. S. 450) but rather one like that involved in *Schenck* v. *United States*, *supra*, which this Court said in *Gitlow* v. *New York*, *supra*, pp. 670-671, "merely prohibits certain acts involving the damager of substantive evil, without any reference to language itself." Where an attempt is made to apply the provisions of such a statute "to language used by the defendant for the purpose of bringing about the prohibited results" (*Gitlow* v. *New York*, *supra*, pp. 670-

671), this Court said in the *Gitlow* case that "it must necessarily be found as an original question, without any previous determination by the legislature, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection" (*Gitlow* v. *New York, supra,* p. 671). The inquiry which this Court thus held to be essential is precisely the one which the statute as construed by the highest court of the State renders immaterial.

Moreover, even were the present statute regarded as having the same character as those involved in the *Gitlow* and *Whitney* cases, it cannot be considered as supported by a legislative finding such as that which this Court treated as adequate in those cases. The New York statute was passed in 1902 after the assassination of President McKinley by an anarchist and was applied during a period of post-war emergency when the New York legislature was considering further means to suppress what it regarded as widespread seditious activity (see Revolutionary Radicalism, Report of the Joint Legislative Committee of the State of New York Investigating Seditious Activity, 1920). The California statute was passed shortly before its application at a time when according to its preamble "large numbers of persons are going from place to place in this State advocating, teaching and practicing criminal syndicalism" (see concurring opinion of Mr. Justice Brandeis, *Whitney* v. *California, supra,* p. 378). But the Georgia statute under which appellant was convicted was passed in 1866, an adaptation of a statute directed against the fomenting of insurrection among slaves which goes back to 1804 (see the Act of May 19, 1804, Clayton, Compilation of the Laws of Georgia 1800-1810, p. 178 No. 132; Georgia Penal Code (1817), Div. III, § 4). With one possible exception, section 56 apparently remained unused until shortly before

it was resurrected in the present case to prevent discharge of appellant from custody following the admonition of a court on a *habeas corpus* hearing that appellant would be discharged unless he were indicted. In these circumstances, it cannot be said that the statute finds support in a legislative finding that attempted persuasion to join the Communist Party or to induce others to support the program of that party (to which, of course, the statute does not refer) gives rise to present danger of acts constituting a substantive evil that the State may constitutionally prevent. Moreover, the decisions in the *Gitlow* and *Whitney* cases rest in effect upon the presumption of constitutionality, but this presumption is that the facts are such that the legislation is reasonable and it may be rebutted by showing that the facts are otherwise (*Borden Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, 209; *Pacific States Co.* v. *White*, 296 U. S. 176, 185). In the *Gitlow* and *Whitney* cases, the Court found nothing to indicate that the conditions at the time of the application of the statute differed essentially from those at the time of its enactment and the normal presumption was that they did not. But historical knowledge within the range of judicial notice suffices to establish such complete disparity between conditions in Georgia at the time of the passage and the time of the application of section 56 of the Penal Code to appellant that if any presumption of constitutionality arises in the instant case it is effectively rebutted. It cannot reasonably be believed that in Georgia "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" (see concurring opinion of Mr. Justice Brandeis, *Whitney* v. *California, supra*, p. 377).[4]

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[4] That the sovereignty of Georgia is secure is a matter of common knowledge; it has been openly conceded by

(2) A State may not, consistently with the due process clause of the Fourteenth Amendment, penalize the advocacy of political, social or economic change to be achieved by lawful means and a statute which is construed and applied so as to render such advocacy criminal violates the fourteenth amendment. *Fiske* v. *Kansas*, 274 U. S. 380. This Court has jurisdiction on appeal to determine whether a State statute as construed to apply to the facts of a particular case by the highest court of a State is in conflict with the Federal Constitution for the application of the statute "affirms its validity as so applied," *Fiske* v. *Kansas, supra*, pp. 385-386; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288-289. "The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented" (*Fiske* v. *Kansas, supra*). As a necessary corollary this Court will in determining the nature of the situation to which the statute has been construed to apply consider whether there is any evidence to support the conclusions of fact of the State court (*Fiske* v. *Kansas, supra*) and that question is therefore Federal in nature.

Whether the statute as construed and applied in this case has the effect of penalizing the advocacy of political, social or economic change to be achieved by lawful means is a substantial Federal question. Examination of the evi-

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counsel for the appellee throughout this case. Appellant admitted that he had only five or six members of the Communist party in Atlanta (R. 104). In 1932 the Communist candidate for President of the United States polled 23 votes in the whole State of Georgia and in 1928 the Communist candidate polled a total of 64 votes in the entire State. In 1924 no votes were cast for the Communist candidate and in 1920 there was no candidate. Georgia's steady and almost unanimous adherence to the tenets of one of the major American political parties demonstrates its tenacity of political opinion.

dence in this case shows conclusively that the defendant did not advocate violence within the meaning of *Fiske* v. *Kansas, supra.* All the evidence at appellant's trial was contained in the portion of the record on his previous appeal to this Court which was appended to the petition for *habeas corpus* as Exhibit C, incorporated in the petition by reference and received in evidence at the hearing on the return to the writ. This evidence consisted of the testimony of three witnesses and certain documents, some of which related to the Communist Party. A part of these documents was in a box under appellant's arm at the time of his arrest; the remainder were found in his room when it was later searched without a warrant (R. 99[5]). The three State witnesses were Watson, the arresting officer (R. 97), Clonts, a clerk in the post office (R. 100) and Assistant Solicitor General Stephens (R. 102). Clonts' testimony concerned only the identity of appellant, a young Negro, as lessee of the post office box in the Federal Post Office Building at Atlanta, Georgia, which he was opening at the time of his arrest. Watson and Stephens identified the documents offered in evidence as taken from appellant's person or found in his room. Both testified that appellant after his arrest had stated that he was an organizer for the Communist Party and Stephens testified that appellant had described his duties as an organizer: "To call meeting, disseminate information regarding the party at these meetings; to distribute literature, to secure members for the meetings and generally to work up an organization of the Communist Party in Atlanta" (R. 104). Stephens further testified that appellant had stated that he held or

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[5] Record references are to record of trial which is Exhibit C in petition for *habeas corpus,* numbered in accordance with pagination of record prepared on the original appeal to this Court.

had attended two or three meetings and had "five or six actual members" of the Communist Party in Atlanta (R. 105).

Neither Watson nor Stephens testified to any further knowledge of appellant or his activities; both swore that they had not seen appellant before his arrest and had no personal knowledge of his previous life and work (R. 99, 107, 109, 110). Stephens testified that appellant stated that he was the author of one or two of the documents in evidence (Nos. 30 or 31, R. 183-6), both of which were characterized by the court below on appeal from the judgment of conviction as "more or less harmless" (178 Ga. 857).

The documents seized by the police officers and which make up the balance of the State's evidence, consist in part of literature published in the interests of the Communist Party, and one or more books of radical economic character which appellant apparently had for his own reading.

Appellant was shown to have distributed copies of two of the papers in evidence. These were the two described by the Supreme Court of Georgia as "more or less harmless." There was no evidence that the remaining documents were distributed by the appellant. His mere possession of the literature does not support the inferences that he was attempting to distribute it, that he was familiar with all its contents and that he was attempting to persuade others to do all the things which were stated to be desirable in the documents; in some cases, indeed, only single copies were found in defendant's room. Even were these inferences permissible however there is nothing in the literature to sustain appellant's conviction. Thirteen of the documents were mentioned in the opinion of the Supreme Court of Georgia (178 Ga. 832) and may therefore be assumed to have influenced its judgment particularly.

Nine of these thirteen were membership books in the Communist Party (3-11, R. 146, 151), which contained a general description of the Communist Party, its aims and purposes. Three of the thirteen documents, "The Communist Position on the Negro Question" (Document 13, R. 156-7), "An Appeal to the Southern Young Workers" (Document 16, R. 169-170) and "Party Organizer" (Document 17, R. 170) were Communistic publications containing party propaganda. The other document relied on by the Georgia court, a book entitled "Communism and Christianism" (Document 15, R. 161-171) was not shown to have any connection with the Communist Party and was apparently mere personal reading matter. The documents which had some connection with the Communist Party contain no exhortations or incitations to violence immediate or remote.[6]

The documents expound and advocate the general aims of the Communist Party such as unity of all workers and organization to improve the conditions of the working class. They advocate certain specific measures such as political and economic rights for Negroes equal to those of whites, "self-determination for the Black Belt," punishment of lynchers, disbanding of military units, abolition of child labor, minimum wages, maximum working hours, strikes and boycotts. Occasionally there is an unexpounded use of the word "revolution" or "revolutionary" in describing the cooperative activities of the Party members. Nowhere is it indicated that revolution by violence is implied; on the contrary the context shows that the words were used as a description of change of a far-reaching type, as for example, in the phrase "industrial revolution." The documents did not advocate forcible resistance to the authority

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[6] The only use of the word is in "Communism and Christianism" in a context which shows it was not a word of incitation.

of the State. Accordingly, whether regarded as expounding the character of the Communist Party or as having been distributed by appellant they provided no warrant for the conclusion that he was advocating violence. In no respect did any of the literature go any further than the preamble to the constitution of the Industrial Workers of the World which this Court held in *Fiske* v. *Kansas, supra,* was within the domain of constitutional protection.

That the Georgia Supreme Court was not unaware of the weakness of the evidence offered in an attempt to show advocacy of violence is evidenced by the reliance it placed upon the proposition that the changes urged in the literature could not be accomplished without probable violent opposition, from which it was inferred that in advocating such changes appellant must have intended that violence should be used in their support (178 Ga. 86). The inference is logically questionable but even if valid it lends no support to the judgment. Possible violent reaction does not justify suppression of the expression of views which may evoke it (Cf. *Near* v. *Minnesota,* 283 U. S. 697, 722; *New York Staats Zeitung* v. *Nolan,* 89 N. J. Eq. 387, 388). If suppression can be justified on these grounds the constitutional protection is nullified at the point at which its importance begins.

At the trial appellant made an unsworn statement to the court in which he stated his belief that the real reason for his arrest was that he had organized an appeal by the unemployed to the city authorities administering relief. In the course of this statement he expressed his judgment that "the system we are living under is on the verge of collapse and that the unemployed have a right to demand food and shelter from the government." Even were it permissible to sustain his conviction on his unsworn statement of his beliefs, men "judging in calmness" could find nothing incendiary in a pessimism then so current or in a belief

in the obligation of government to support the needy so generally recognized. There was nothing in the statement indicating that he had urged others to resist the authority of the State by force or that he thought the time propitious for any sort of drastic political action (R. 118-128). Thus all the evidence at the trial established only that Herndon had admitted extrajudicially being an organizer for the Communist Party and that he had in his possession the documents which have been described above. The evidence was insufficient to establish that either appellant individually or as a member of the Communist Party had advocated violence which would deny him the constitutional protection which this Court enforced in *Fiske* v. *Kansas*. Accordingly, the statute is invalid as construed to apply to his conduct and the judgment of conviction and sentence of from 18 to 20 years in the penitentiary cannot stand. *Fiske* v. *Kansas*, *supra*.

(3) Whether the statute as construed and applied by the Supreme Court of Georgia is too vague and indefinite to provide a standard of guilt which is sufficiently ascertainable to satisfy the due process clause of the Fourteenth Amendment is a substantial Federal question. The statute was held invalid on this ground by the Georgia Superior Court which sustained the writ of *habeas corpus* (R. 20). The construction of the statute to require that the insurrection which need neither have occurred nor been imminent should be intended to "happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce" constitutes "an unequivocal rejection of the test of clear and present danger, yet a denial also of responsibility without boundaries in time • • • a standard wholly novel, the expectancy of life to be ascribed to the persuasive power of an idea" (Mr. Justice Cardozo,

dissenting, *Herndon* v. *Georgia*, 295 U. S. 454). It is not necessary under this test that one should in fact believe that his speech or effort will actually cause violent insurrection at any time. What is necessary is that he intend such violence within a time which a jury estimates to be a reasonable measure of the persuasive power of his ideas. The uncertainty in making such an estimate may be relatively unimportant in cases where the incitement is such that the hiatus between utterance and action is very short. In such cases, common experience of men's responses may furnish some guide. But where that is not the case, where the trajectory of an idea calling for action by large numbers of people may extend into the indefinite future, as the court below seems to have conceded to be true in the instant case, neither juries nor trained experts can have the knowledge necessary to measure its length. In *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 223, this Court observed that while it "is easy to put simple cases" the case before the Court was complex and "the law must be judged by it." The period during which persuasion may remain effective, during which men will march to the measure of another man's thought, is in a case like the present not only completely outside the experience of ordinary men; it is entirely within the realm of the unknown and the unknowable. Accordingly, a jury, possibly influenced by the passion and prejudice engendered by the views of an unpopular minority, is free to speculate about a question which it cannot answer and, upon the product of its speculation to award judgment of death. A statute the application of which is conditioned upon the answer to such an inquiry provides a standard of guilt which is completely indefinite and therefore is invalid under the due process clause.[7] *United States* v. *L. Cohen Grocery*

[7] The absence from the statute of reasonably ascertainable standards of guilt is emphasized by its elastic quality

Company, 255 U. S. 81; *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Connally* v. *General Construction Company*, 269 U. S. 385; *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210, 243; *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 51.

It is especially important that a statute which limits the free exercise of constitutional rights on penalty of death, in the discretion of the jury, should provide a reasonably definite rule of permissible conduct so that the citizen may know where the line is drawn and so that, being fairly on the right side of the line, he may not be deemed to have crossed it when inflamed passions rule men's decisions. If constitutional rights are to be preserved, the traps which are designed to catch those who unlawfully abuse them must at least be marked and not hidden in a form of words so obscure that no one can tell where they may lie, unless prepared to risk his life in the adventure. A statute limiting freedom of speech by a rule so indefinite is, by reason of its indefiniteness alone, an unreasonable limitation. This Court has recently said (in language equally applicable to the right of free speech): "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250. Such indefinite limitations are as destructive of constitutional rights as the "taxes on knowledge" abhorred

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in the hands of the Georgia courts. In appellant's case, it has been interpreted in three different and inconsistent ways by the Georgia courts, in addition to having been held invalid for uncertainty by one of them. None of the courts by which the statute has been considered has explained the meaning of the construction discussed above, beyond stating that the evidence sustains appellant's conviction thereunder. (See the opinion on petition for rehearing, 179 Ga. 600.)

by the colonists and the Louisiana statute condemned by this Court in the *Grosjean* case. This contention likewise involves a substantial Federal question.

Conclusion.

WHEREFORE, it is respectfully submitted that the appellant in the above-entitled cause comes within the proper jurisdiction of this Court.

WHITNEY NORTH SEYMOUR,
Attorney for Appellant.

HERBERT T. WECHSLER,
W. A. SUTHERLAND,
WALTER GELLHORN,
Of Counsel.

APPENDIX A.

Opinion of the Superior Court of Fulton County.

FULTON SUPERIOR COURT.

No. 141.

ANGELO HERNDON

vs.

J. I. LOWRY, Sheriff.

Habeas Corpus.

At the trial of the writ above stated, testimony and documents hereinafter referred to were tendered in evidence, objections made to the admissibility, and decision thereon reserved.

1. Applicant presented testimony identifying records before the Supreme Court of the United States in the case of Herndon versus State of Georgia.

2. Applicant tendered portions of records to which reference is above made.

3. Respondent tendered motion to quash indictment No. 37812, on which Herndon was tried and convicted, as made in this Court at his trial by a jury.

Held, objection overruled.

Applicant submits contentions that the law under which he was convicted is, as construed and applied in his case, unconstitutional, and that his detention thereunder is illegal, void and of no effect.

Held and adjudicated: That the applicant's contention that this law in question as construed and applied in his case is in conflict with the fourteenth amendment of the Constitution of the United States, in that it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt; and that it is also in conflict with Article 1, section 1, paragraph 3, of the Constitution of the State of

Georgia, for the same reason, and that his conviction and sentence are unconstitutional, illegal, void and of no effect, be and the same is hereby sustained.

Contentions of applicant other than that above stated are not sustained.

ORDERED that the applicant be, and he is hereby, remanded to the custody of the respondent for twenty (20) days, such being the period allowed by law in which exceptions and appeal to the higher court may be taken by respondent to this order and judgment; and if such exceptions and appeal shall be taken then and until the final disposition of the case by the higher courts. Provided, however, that at any time applicant may be released of custody upon giving bail with good and sufficient surety acceptable to the sheriff of this county in the sum of Eight Thousand ($8,000.00) Dollars, conditioned upon applicant appearing and abiding the ultimate judgment and sentence of the Court if this order and judgment should be set aside.

And provided further, that if there shall be no exceptions to this order and judgment, and no appeal taken to the higher court, Applicant shall, at the expiration of the period aforesaid, be immediately released and discharged to respondent's custody in so far as he is held and restrained of his liberty under the conviction and sentence referred to herein.

(Signed) HUGH M. DORSEY,
Judge, Superior Court, Fulton Co.

December 7, 1935.

APPENDIX B.

Opinion of the Supreme Court of Georgia.

No. 11216. No. 11226.

SUPREME COURT OF GEORGIA.

LOWRY, *Sheriff*,

v.

HERNDON, *et vice versa*.

Decided June 13, 1936.

By the Court:

ATKINSON, *Justice*:

1. It is declared by statute: "Any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State shall constitute an attempt to incite insurrection." Code of 1933, Sec. 26-902. In Herndon *v.* State, 178 Ga. 832, 174 S. E. 597, as explained on motion for rehearing in Herndon *v.* State, 179 Ga. 597, 598, 600, 176 S. E. 620, 621, the statute was construed: "It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending. • • • Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce." Held:

(a) Neither as expressed, nor as it was construed by this court, is the above statute void, as violative of the

fourteenth amendment of the Federal constitution (Code 1933, Sec. 1-815) for the alleged reasons (1) that it "denies and unduly restricts freedom of speech and of assembly;" (2) that "it is too vague and indefinite to provide a sufficiently ascertainable standard of guilt."

(b) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 3 of the constitution of the State of Georgia (Sec. 2-103) which provides: "No person shall be deprived of life, liberty, or property, except by due process of law," for the same above alleged reasons.

(c) Neither is the statute so construed and applied void as violative of the provisions of article 1, section 1, paragraph 15 of the constitution of the State, (Sec. 2-115) "No law shall ever be passed to curtail, or restrain the liberty of speech, or of the press; any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

(d) Neither is the statute as so construed and applied void as violative of the provisions of article 1, section 1, paragraph 24, of the constitution of the State (Sec. 2-124): "The people have the right to assemble peaceably for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance."

The foregoing provisions of the constitution do not guarantee freedom of speech or the right of assembly in the perpetration of a crime.

2. After conviction of attempting to incite insurrection under the foregoing statute, and affirmance of the final judgment on writ of error to this court, and detention by the sheriff, the court erred in habeas corpus proceedings based on alleged unconstitutionality of the statute in holding the statute violative of the fourteenth amendment to the constitution of the United States (Code 1933, Sec. 1-815) and also of article 1, section 1, paragraph 3, of the constitution of the State (Sec. 2-103), in that relatively to both provisions of the State and Federal constitutions, the stat-

ute is "too vague, and indefinite to provide a sufficiently ascertainable standard of guilt."

3. The court did not err in refusing to hold the statute void as violative of the several provisions of the State and Federal constitutions on the several other grounds of attack urged against them as specifically stated in the first division, to which the cross bill of exceptions relates.

4. Under the pleadings and the evidence, which embraced the record on the trial that resulted in the conviction, the court erred in the habeas corpus proceeding in refusing to remand the prisoner to the custody of the officers.

Judgment reversed on the main bill of exceptions. Affirmed on the cross bill. All the Justices concur, except Russell, C. J., not participating.

Beck, P. J., concurs in the judgment.

APPENDIX C.

Opinion of the Supreme Court Denying Petition for Rehearing Following Affirmance of Judgment of Conviction. (179 Ga. 597.)

On Motion for Rehearing[1].

No. 9871.

September 28, 1934.

"Bell, *J.*:

Angelo Herndon was convicted of the offense of an attempt to incite an insurrection as defined in the Penal Code, § 56, and was given a sentence in accordance with section

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[1]The original opinion of the Supreme Court of Georgia, 178 Ga. 832, is not included in this statement because of its length. A copy of the opinion is included in the record of this court in Herndon *v.* The State, No. 665, October Term, 1934.

57. His motion for a new trial was overruled, and the judgment was affirmed by this court in a decision reported in 178 Ga. 832. No attack upon the constitutionality of the statute under which he was convicted was made in the court below, and none was attempted in this court prior to the decision referred to and the judgment based thereon. But, during the same term in which the judgment of affirmance was rendered and before the remittitur was forwarded to the clerk of the trial court, the defendant (plaintiff in error) filed a motion for a rehearing, suggesting some constitutional considerations, and being in its material parts as follows:

'Upon the trial of this case in the court below, the trial judge charged the jury (R. 195): "• • • That advocacy, however reprehensible morally, is not sufficient to convict the defendant where there is no evidence to indicate that the advocacy would be acted upon immediately. In order to convict the defendant, gentlemen, it must appear clearly by the evidence that immediate serious violence against the State of Georgia was to be expected or advocated." And also (R. 195) "that an attempt to commit an act which is, in fact, a crime, is not complete unless the alleged crime is dangerously near completion." Thus, as the trial judge construed the statute in question, it does not make criminal *every* attempt, by persuasion or otherwise, to induce others to join in combined resistance to the authority of the State, but only *such* attempts as are intended to bring about such resistance immediately or as are likely under all the circumstances to bring about such resistance immediately. The jury having returned a verdict of guilty, the plaintiff in error moved for a new trial on the ground that the verdict was contrary to law and the evidence (R. 16), and, his motion for a new trial having been denied, he duly excepted (R. 2). In construing the statute for the purpose of determining whether the evidence was sufficient to support the verdict, this court said in its opinion (174 S. E. 609): "It is immaterial whether the authority of the State was in danger of being subverted or that an insurrection actually occurred or was impending." And this court also said (174 S. E. 610): "Force must have been contemplated, but,

as said above, the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but it would be sufficient that he intended it to happen at any time as a result of his influence, by those whom he sought to incite. It was the intention of this law to arrest at its incipiency any effort to overthrow the State government, where it takes the form of an actual attempt to incite others to insurrection." Thus, as this court construed the statute, every attempt to persuade others to join in combined resistance to the authority of the State is criminal, provided only that the person making the attempt intended forcible resistance to occur at some time, however remote, as the result of his persuasion, however unlikely that his attempt would succeed. It is obvious that this court's construction of the statute is radically different from that of the trial judge. That means that the statute as applied by the trial court was a very different statute from the statute as applied by this court.

'Under the trial judge's construction, the evidence was insufficient to support the verdict of guilty unless it was proved either that the plaintiff in error attempted to persuade others to engage in *immediate* forcible resistance to the authority of the State or that the plaintiff in error should have foreseen under the circumstances that forcible resistance was likely to result *immediately*. Under this court's construction of the statute, the evidence was sufficient to support the verdict if it was proved that the plaintiff in error intended that forcible resistance to the State's authority should occur at any time whatever as the result of his persuasion, however unlikely that result under the circumstances. The rigid and narrow construction of the statute by this court necessarily raises the question whether the statute as construed and applied *by this court* to the facts of this case was repugnant to the due-process clause of the fourteenth amendment to the Federal constitution. This question was obviously material to a decision of the appeal of the plaintiff in error because if the statute as con-

strued by this court is unconstitutional the judgment of guilty rendered by the court below could not be lawfully affirmed. Moreover, no procedural obstacle is present to prevent consideration and determination of the constitutionality of the statute in question as construed and applied *by this court*. That question originated in this court, and the plaintiff in error was not required to anticipate, nor could he have anticipated, while the case was in the trial court, that this court would construe and apply the statute differently and even more strictly than it had been construed and applied in the trial court. Neither by an exception to the trial judge's charge, on the ground that the statute as construed by the trial judge was unconstitutional, nor by any conceivable assignment of error could the plaintiff in error have raised in the trial court the question of the constitutionality of the statute as it was subsequently construed and applied by this court. That question was therefore not only material to a decision of the appeal of the plaintiff in error but it is properly before this court, since it originated here and is now called to the attention of this court by the plaintiff in error at the first opportunity for so doing. The plaintiff in error respectfully submits that under the decisions of the Supreme Court of the United States in Schenck *v.* U. S., 249 U. S. 47, 52, Fiske *v.* Kansas, 274 U. S. 380, and Stromberg *v.* California, 283 U. S. 359, the statute as construed and applied by this court is repugnant to the due-process clause of the fourteenth amendment. This constitutional question was first presented by the decision of this court and should be considered by it before making a final determination of the appeal of the plaintiff in error. The plaintiff in error respectfully submits that this court should grant a rehearing of the appeal so that the court may now consider and decide the question whether the statute as construed and applied by it is constitutional.'

1. The language used by this court should be considered with the usual reasonable implications. The phrase 'at any time', as criticized in the motion for rehearing, was not intended to mean at any time in the indefinite future, or at any possible later time, however remote. An activity now

could hardly be expected to be the direct producing cause of an insurrection after the lapse of a great period of time, and it was not the purpose of this court to suggest that as to the mental requisite any such intent would be a sufficient ingredient of an attempt to incite an insurrection. On the contrary the phrase 'at any time' was necessarily intended, and should have been understood, to mean within a reasonable time; that is, within such time as one's persuasion or other adopted means might reasonably be expected to be directly operative in causing an insurrection. Accordingly, the statements by this court as quoted in the motion for rehearing are to be accepted in the following sense: Force must have been contemplated, but the statute does not include either its occurrence or its imminence as an ingredient of the particular offense charged. Nor would it be necessary to guilt that the alleged offender should have intended that an insurrection should follow instantly or at any given time, but as to this element it would be sufficient if he intended that it should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce. This statement, considerate with what was said in the original decision, represents the view of this court as to the proper construction of the statute under consideration; and under the statute as thus interpreted, we say, as before, that the evidence was sufficient to authorize the conviction. In view of what has been said above, it would seem that all contentions made in the motion for rehearing should necessarily fail, based as they are, upon an erroneous construction of our decision.

2. But to treat the motion as urged to the same extent under the decision as properly interpreted, it is a mere attempt to draw into question the constitutionality of the statute under which the defendant was convicted, where no such question was raised and passed upon in the trial court. Under repeated rulings by this court, a constitutional question can not be so presented. In Brown *v.* State, 114 Ga. 60 (2) (39 S. E. 873), it was said: 'This court will never pass upon the constitutionality of an act of the

General Assembly unless it clearly appears in the record that the point was directly and properly made in the court below and distinctly passed on by the trial judge.' See also Griggs *v.* State, 130 Ga. 16 (60 S. E. 103); Conyers *v.* Luther Williams Banking Co., 162 Ga. 350 (133 S. E. 862), and cit. In Loftin *v.* Southern Security Co., 162 Ga. 730(3) (134 S. E. 760), this court held as follows: 'Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review.' In Dunaway *v.* Gore, 164 Ga. 219, 230 (138 S. E. 213), the following statement was made: 'Indeed it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code, § 6502), which provides that the Supreme Court "shall be a court alone for the correction of errors," this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court. It is upon errors alleged by the complaining party to have been committed in the court below that this court must confine itself.' The provision of the State constitution as referred to in that case declares further, that 'The Supreme Court • • • shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, and such other like courts as have been or may hereafter be established in other cities.' The principles ruled in the foregoing decisions can not be avoided by the circumstances referred to in the motion for rehearing. Regardless of the construction placed upon this statute either by the trial court or by this court, the defendant could have presented to the court below the construction which he deemed to be the proper one and in connection therewith could have attacked the statute upon any chosen constitutional ground. Cf. Hutchings *v.* Roquemore, 164 Ga. 637 (2) (139 S. E. 216).

In the brief it is stated that under the construction of the statute as adopted by this court, it is unconstitutional for the additional reason that it 'at once becomes so indefinite and uncertain that a conviction under it necessarily is a

denial of due process.' What has been said will apply also to the contention thus made. Furthermore, in West *v.* Standard Insurance Co., 176 Ga. 54 (166 S. E. 761), it was said: 'The constitutionality of a statute can not be raised for the first time in the brief of counsel filed in the Supreme Court.' See also Houston *v.* Thomas, 168 Ga. 67, 72 (146 S. E. 908). Accordingly, no question as to the constitutionality of § 56 is presented, and none is decided. The situation here is different from that involved in Hollman *v.* State, 175 Ga. 232 (165 S. E. 11), where this court held unconstitutional an act relating to applications for certiorari to review decisions and judgments of the Court of Appeals. The question there decided was one with which a trial court never could have been concerned.

The conclusion reached above is necessarily confined to the power and jurisdiction of this court, and is not contrary to such decisions as the following, which relate to the power and jurisdiction of the United States Supreme Court. Grannis *v.* Ordean, 234 U. S. 385, 392 (34 Sup. Ct. 779, 58 L. Ed. 1363); Saunders *v.* Shaw, 244 U. S. 317 (37 Sup. Ct. 638); Missouri ex rel. Mo. Ins. Co. *v.* Gehner, 281 U. S. 313 (50 Sup. Ct. 326); Brinkerhoff-Faris Co. *v.* Hill, 281 U. S. 673 (50 Sup. Ct. 451); American Surety Co. *v.* Baldwin, 287 U. S. 156 (53 S. E. 98). There is no merit in the motion for rehearing.

The foregoing has been prepared as the decision of this court in accordance with the views of the majority. The writer concurs in all that is said in the first division, and agrees also that the motion for rehearing should be denied. He does not, however, deem it necessary to commit himself either way at this time upon the correctness, under the particular facts of this case, of the reasons given above for the refusal to decide the constitutional question referred to in the motion for rehearing. In the opinion of the writer, the same conclusion may be reached upon a different basis, as to which certain observations will now be made. In the following discussion, however, he will speak for himself alone, and the views expressed will constitute no part of the decision, nor be taken as representing the opinion of any of the other Justices.

In order to raise a constitutional question, it is necessary, among other things, that the particular provision of the constitution alleged to have been violated by the statute shall be clearly designated. Griggs *v.* State, *supra;* Spielberger *v.* Hall, 159 Ga. 511 (2) (126 S. E. 391); Inlow *v.* State, 168 Ga. 377 (147 S. E. 881). And it must also be stated wherein that provision of the constitution is violated. Pace *v.* Goodson, 127 Ga. 211 (56 S. E. 363); Curtis *v.* Helen, 171 Ga. 256 (2c) (155 S. E. 202); Jordan *v.* State, 172 Ga. 857 (159 S. E. 235).

The due-process clause of the fourteenth amendment relates to life, liberty, and property, and there is more than one kind of liberty. The term may include, but is not limited to freedom of speech. Stromberg *v.* California, 283 U. S. 359 (3) (51 Sup. Ct. 532). The motion fails to state whether it is this or some other right or liberty of which the movant claims to have been deprived by the statute under consideration, and it is only by a study of the decisions cited therein and by statements in the accompanying brief that one is able to discern that it is liberty of speech which the statute is deemed to unwarrantably abridge. Obviously, therefore, the motion does not make a sufficiently definite attack upon the constitutionality of this statute, under the settled rule in this State.

But even to consider on its merits the question thus suggested, it is clear that the statute does not violate the due-process clause of the fourteenth amendment as related to liberty of speech. Any such contention would appear to be conclusively answered by the decisions of the Supreme Court of the United States in Gitlow *v.* New York, 268 U. S. 652 (45 Sup. Ct. 625); Whitney *v.* California, 174 U. S. 357 (47 Sup. Ct. 641). In the case last cited Mr. Justice Brandeis filed a special concurrence in which he was joined by Mr. Justice Holmes. Even in that opinion it was said that the right of free speech is not absolute and is subject to restriction 'if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.' And in the same opinion it was further said, 'That the necessity which is essential to a valid restriction does not exist unless speech

would produce, *or is intended to produce,* a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled' (Italics ours.) In connection with this statement the author cited the case of Schenck *v.* United States, 249 U. S. 47, 52 (39 Sup. Ct. 247).

Under the statement made in the foregoing opinion by the court as to the sense and meaning of the original decision in the present case, the statute does not fail for want of sufficient certainty. All men subject to its penalties may well know what acts it is their duty to avoid. United States *v.* Brewer, 139 U. S. 278 (11 Sup. Ct. 538, 35 L. Ed. 190). See again the decision of Whitney *v.* California, *supra.*

Motion for rehearing denied. All the Justices concur, except

Russell, C. J. Not having participated in the original opinion delivered by the court, I decline to participate upon the motion for rehearing."

Filed in office, September 11, 1936. K. C. Bleckley, C. S. C. Ga.

(8327-C)